Filed 7/19/19 P. v. Rice CA3

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. ROBERT RICE, Defendant and Appellant.	C086973 (Super. Ct. No. 17FE023970)

In March 2018, in Sacramento County Superior Court case No. 17FE023970, a jury found defendant Robert Rice guilty of taking a vehicle worth more than $950 without the owner's consent.[1] (Veh. Code, § 10851, subd. (a).) At defendant's request, trial on a prior prison term allegation under Penal Code section 667.5, subdivision (b)

[1] Finding defendant guilty on this count precluded the jury from also finding defendant guilty of unlawfully receiving a stolen vehicle. The court dismissed that count in the interest of justice.

was bifurcated.[2] The jury found the allegation true. As to a separate enhancement, defendant waived a jury trial and admitted a prior felony conviction for violating Vehicle Code section 10851, subdivision (a). (§ 666.5.)

Also, in March 2018, in Sacramento County Superior Court case No. 17FE008868, the court found defendant had violated his probation based on his new criminal conduct.

The court sentenced defendant to an aggregate term of five years in prison for both cases: The upper term of four years for taking a vehicle without the owner's consent; one year for the section 667.5, subdivision (b) enhancement; and a concurrent middle term of two years for the probation violation.

On appeal, defendant raises various challenges to the sufficiency of the evidence to support his conviction for a felony violation of taking a vehicle without the owner's consent. Defendant also contends the prosecutor improperly argued facts not in evidence, and the trial court improperly took judicial notice of an essential element of the prior prison term allegation. We will affirm the judgment.

I. BACKGROUND

Danielle was introduced to defendant on Christmas Day 2017 by her friend Nick. Nick and defendant came to Danielle's house in Sacramento at 10 p.m., and the three of them played ping pong in her garage. Danielle lives alone with her children, who were asleep. No one else was there.

At around midnight, Danielle drove Nick and defendant to a nearby casino in her car. Danielle's car is a 2006 Nissan Altima. At the time, she had had it for two and a half or three months. The car was still registered to her grandmother, who let her use it because her other vehicle was having problems. Danielle had the only set of keys, and

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[2] Undesignated statutory references are to the Penal Code.

she drove the car every day. No one else regularly drove the car. Danielle managed the upkeep of the car, such as getting the oil changed, and had just purchased new tires. The car had about 120,000 miles on it and was in "okay shape."

At around 1:30 in the morning, Danielle, Nick, and defendant left the casino. They had not been drinking, and Danielle could drive her own car home. She dropped Nick off at his girlfriend's house. Danielle was going to drop defendant off at wherever he was staying, but defendant said he left his sweatshirt at her house and needed to get it.

Back at Danielle's house, it was only defendant and herself. Her children were still asleep.

Defendant said he was having a hard time getting ahold of the friend he was staying with and asked if he could take a shower at Danielle's house.[3] Danielle acquiesced. She waited for defendant for about 20 minutes while he was in the bathroom before accidentally falling asleep on the couch near a keychain with the keys to her house, garage, and car. It was about 2:30 a.m.

When she woke up, it was morning and defendant, the keys, and the car were gone. Danielle had not given defendant permission to drive her car.

Danielle called Nick, but was unable to reach him. She tracked defendant down on social media and sent him a message. When she did not hear back, she reported her car stolen at around 1 p.m.

The car was equipped with a vehicle tracking system, and a police officer working patrol used it to track the car to an apartment complex in Folsom. Before finding the car, the officer saw defendant leaving the parking lot and holding a set of keys. The officer

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[3] Danielle testified defendant never directly asked her if he could spend the night at her house, and that if he had asked, she would have said no. The parties stipulated that, if he was recalled to testify, the officer who recovered the car would state that Danielle told him that defendant asked if he could stay at her house and she had said that was fine.

found the car about 25 yards from where he saw defendant. He then obtained a photograph of the suspected thief and recognized defendant. The officer's partner detained defendant in the apartment complex after about a 40-minute search. A search was also conducted for the keys, but they were never found.

Danielle purchased the car from her grandmother for $2,000 in January 2018. Danielle testified that, in her opinion, the car was worth about $4,000.

II. DISCUSSION

A. Defendant's Conviction for Taking A Vehicle Without the Owner's Consent

Defendant raises multiple challenges to his conviction for taking a vehicle in violation of Vehicle Code section 10851, subdivision (a). It provides: "Any person who drives or takes a vehicle not his or her own, without the consent of the owner thereof, and with intent either to permanently or temporarily deprive the owner thereof of his or her title to or possession of the vehicle, whether with or without intent to steal the vehicle, . . . is guilty of a public offense . . . ." (Veh. Code, § 10851, subd. (a).) A violation is a "wobbler" offense, punishable as either a misdemeanor or a felony. (*People v. Jackson* (2018) 26 Cal.App.5th 371, 377.)

1. Sufficiency of the Evidence

Following the close of the prosecution's case-in-chief, defendant brought a motion to acquit under section 1118.1 based on the fact the prosecution did not present any testimony about whether defendant had consent to drive the car from the person who was its registered owner at the time of its taking. The court denied the motion.

Defendant contends the trial court erred in denying his motion for acquittal because, at the end of the prosecution's case-in-chief, there was insufficient evidence defendant took the vehicle without the consent of Danielle's grandmother. Defendant also argues the evidence was insufficient to support his conviction after the close of all the evidence. For these reasons, he contends his conviction violated his due process rights.

"In reviewing a challenge to the sufficiency of the evidence under the due process clause of the Fourteenth Amendment to the United States Constitution and/or the due process clause of article I, section 15 of the California Constitution, we review the entire record in the light most favorable to the judgment to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt." (*People v. Cole* (2004) 33 Cal.4th 1158, 1212 (*Cole*).)

"In ruling on a motion for judgment of acquittal pursuant to section 1118.1, a trial court applies the same standard an appellate court applies in reviewing the sufficiency of the evidence to support a conviction, that is, ' "whether from the evidence, including all reasonable inferences to be drawn therefrom, there is any substantial evidence of the existence of each element of the offense charged." [Citations.]' [Citation.] 'Where the section 1118.1 motion is made at the close of the prosecution's case-in-chief, the sufficiency of the evidence is tested as it stood at that point.' " (*Cole, supra,* 33 Cal.4th at pp. 1212-1213.)

"We review independently a trial court's ruling under section 1118.1 that the evidence is sufficient to support a conviction. [Citations.] We also determine independently whether the evidence is sufficient under the federal and state constitutional due process clauses." (*Cole, supra,* 33 Cal.4th at p. 1213.)

"A violation of [Vehicle Code] section [10851, subdivision (a)] requires proof of a specific intent to deprive the owner of the car of possession or title for either a temporary or permanent period. [Citation.] The language of the statute places the burden on the People to show by direct or *circumstantial* evidence the defendant lacked the consent of the owner." (*People v. Clifton* (1985) 171 Cal.App.3d 195, 199, italics added.)

Defendant's arguments regarding the sufficiency of the evidence assume Danielle's grandmother was the owner of the car for purposes of Vehicle Code section 10851 at the time of its taking. Because we reject his sufficiency of the evidence claims,

we need not decide whether the evidence was also sufficient to conclude Danielle owned the car at the time of its taking notwithstanding the fact she had yet to pay her grandmother for it and obtain title. (See *People v. Clifton, supra*, 171 Cal.App.3d at p. 200 ["[O]ne may be considered to be an owner of a car although he has not transferred the title in the manner required by the Vehicle Code"].)

The circumstances surrounding the taking and recovery of the car provide ample circumstantial evidence that defendant did not have the consent of anyone who might have been considered an owner of the car. He did not drive the car in Danielle's presence. He only drove the car after taking the keys while Danielle was sleeping, along with her other keys, and then disposed of these keys after he saw the patrol officer. Defendant's conduct reflects a consciousness of guilt sufficient to support the reasonable inference he did not have the grandmother's consent to drive the car. There is no contrary evidence defendant had Danielle's grandmother's permission to drive the car or that he even communicated with her, as she was not present at Danielle's house. Accordingly, there was sufficient circumstantial evidence to support his conviction. "We reject defendant's claim under the federal and state constitutional due process clauses and, as a result, reject his claim under section 1118.1 as well." (*Cole, supra,* 33 Cal.4th at p. 1214.)

2. Alleged Prosecutorial Misconduct

During closing argument, the prosecutor argued:

"You could take that same circumstantial evidence and apply it to grandma, too. It's 2 o'clock in the morning. [Defendant] disappears into the bathroom. The only—there is no logical and reasonable interpretation of the circumstantial evidence to indicate that grandma somehow gave him permission. [¶] For the first time anybody else, other than [Danielle], has had permission to drive that vehicle. It's not like he went into that bathroom and got permission from grandma. [¶] Both of these women were owners of the vehicle. There was no consent given to the defendant."

Defendant contends these remarks improperly argued facts that were not in evidence. We disagree.

"A prosecutor's misconduct violates the Fourteenth Amendment to the United States Constitution when it 'infects the trial with such unfairness as to make the conviction a denial of due process.' [Citations.] In other words, the misconduct must be 'of sufficient significance to result in the denial of the defendant's right to a fair trial.' [Citation.] A prosecutor's misconduct that does not render a trial fundamentally unfair nevertheless violates California law if it involves 'the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.' [Citations.] [¶] When the issue 'focuses on comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion. [Citations.] Moreover, prosecutors 'have wide latitude to discuss and draw inferences from the evidence at trial,' and whether 'the inferences the prosecutor draws are reasonable is for the jury to decide.' " (*Cole, supra,* 33 Cal.4th at pp. 1202-1203.)

Assuming these claims have been preserved for our review, there was no prosecutorial error. Defendant's argument rests on the notion there was no evidence to prove lack of consent from Danielle's grandmother. As we have discussed, the circumstantial evidence was sufficient to support the inference Danielle's grandmother did not give defendant permission to drive the car. The prosecutor's statements were well within his wide latitude to discuss and draw inferences from the evidence in the record.

3. Value of the Vehicle

To obtain a felony conviction based on the taking of a vehicle under Vehicle Code section 10851, the prosecution was required to prove the car defendant took was worth more than $950. (*People v. Jackson, supra,* 26 Cal.App.5th at p. 378.) He raises various challenges relating to the sufficiency of the evidence regarding the car's value.

a. Danielle's Testimony

Danielle testified that, in her opinion, the car was worth about $4,000. She said her opinion was based on "how much [she] would sell it for based on what Kelly [*sic*] Blue Book said" and that she was considering "[t]he condition [and] the miles" in determining what she would sell it for. Danielle also testified she paid her grandmother $2,000 for the car: "Because it was from my grandma. My grandma knows that I'm a single mom and, you know, she's not going to charge me full price for a car." On cross-examination, Danielle testified that she looked up the Kelley Blue Book value in January when she bought the car from her grandmother, and she entered the miles and that the car was in fair condition. She agreed that was the only source of information she had as far as the value of the car. She testified she is "not Kelly [*sic*] Blue Book certified."

Defendant's trial counsel objected to Danielle's testimony about the value of the car as hearsay and under *Crawford v. Washington* (2004) 541 U.S. 36 and *People v. Sanchez* (2016) 63 Cal.4th 665 (*Sanchez*). As a result of this objection, the jury was instructed, "Testimony concerning Kelly [*sic*] Blue Book values may not be considered for the truth of the vehicle's value. [¶] The jury may consider the testimony for the limited purpose of considering the basis of the witness's opinion as to that the [*sic*] value and her decision to purchase the vehicle for the amount she stated." The jury was also instructed, "A witness gave her opinion of the value of the property she owned. In considering the opinion, you may but are not required to accept it as true or correct. [¶] Consider the reasons the witness gave for any opinion, the facts or information on which she relied in forming that opinion, and whether the information on which the witness relied was true and accurate. [¶] You may disregard all or any part of an opinion that you find unbelievable or unreasonable. [¶] You may give the opinion whatever weight, if any, you believe it deserves."

The prosecutor argued thereafter, "The evidence that you received about the value of the vehicle came mostly in the way of what Danielle's opinion . . . of the vehicle is,

but you've got an instruction that says you can consider that. [¶] You heard what she actually paid for it and then you heard about the condition of the vehicle. You heard about the—the miles the vehicle has. And you can use your common sense to assist you in determining whether or not the opinion was valid or not. [¶] Her opinion was that it was worth $4,000. She knows this vehicle. She maintains the upkeep. She just put on new tires. The paint's in fair condition. There wasn't any major structural damage. Had 120,000 miles on it but it's a [2006] Nissan [Altima]. Take the—her opinion for what you—what you will. [¶] What she actually paid at the extreme grandma discount was $2[,]000 which is still more than [$950]. You don't need to conclude that it's worth [$]2,000[.] You don't have to conclude that it's worth [$]4,000. You conclude that it's worth more than [$950]. [¶] We know it's operable. We know it works. And it's in[ ]decent condition. It's worth more than [$950]."

b. Sufficiency of the Evidence

Defendant contends his felony conviction must be reversed because there was insufficient evidence the car was worth more than $950. He asserts the only basis for the jury's finding that the value of the car was greater than $950 was the information from Danielle that she retrieved from Kelley Blue Book. Defendant argues this information did not satisfy the requirements for the hearsay exemption for a published compilation under Evidence Code section 1340.[4] Alternatively, he argues that even if information obtained from Kelley Blue Book is admissible under Evidence Code section 1340 to prove the value of a vehicle, the evidence must be introduced by an expert in automobile valuation who inspects the vehicle.

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[4] "Evidence of a statement, other than an opinion, contained in a tabulation, list, directory, register, or other published compilation is not made inadmissible by the hearsay rule if the compilation is generally used and relied upon as accurate in the course of a business as defined in [Evidence Code s]ection 1270." (Evid. Code, § 1340.)

As a threshold matter, an owner of property may testify as to its value; expert testimony is not required. (Evid. Code, § 813, subd. (a)(2); *People v. Henderson* (1965) 238 Cal.App.2d 566, 566-567.) Danielle owned the car at the time she testified. Thus, Danielle was competent to testify as to its value.

Defendant's arguments regarding the admissibility of information from Kelley Blue Book assume Danielle actually testified as to hearsay information from Kelley Blue Book. This argument contains an inaccurate assumption. "[A] hearsay statement is one in which a person makes a factual assertion out of court and the proponent seeks to rely on the statement to prove that assertion is true." (*Sanchez, supra*, 63 Cal.4th at p. 674.) Danielle never said exactly what Kelley Blue Book indicated her car was worth, though it formed at least the primary foundation of her opinion that the car was worth about $4,000. Additionally, the jury was instructed, "Testimony concerning Kelly [*sic*] Blue Book values may not be considered for the truth of the vehicle's value." " ' "Jurors are presumed to be intelligent, capable of understanding instructions and applying them to the facts of the case." ' " (*People v. Carey* (2007) 41 Cal.4th 109, 130.) In keeping with this instruction, during closing argument, the prosecution did not mention any hearsay information from Kelley Blue Book or argue that any such information reflected the true value of the car. We thus need not consider whether information from Kelley Blue Book is admissible under a hearsay exception because it was not so admitted.

Defendant argues the trial court's limiting instruction did not cure any error in admitting hearsay because the information Danielle obtained from Kelley Blue Book was necessarily offered for the truth of the matter asserted. In *Sanchez, supra*, 63 Cal.4th 665, our Supreme Court explained an expert may "*rely* on hearsay in forming an opinion, and may tell the jury *in general terms* that he did so." (*Id.* at p. 685.) "What an expert *cannot* do is relate as true case-specific facts asserted in hearsay statements, unless they are independently proven by competent evidence or are covered by a hearsay exception." (*Id*. at p. 686.) "When any expert relates to the jury case-specific out-of-court statements,

and treats the content of those statements as true and accurate to support the expert's opinion, the statements are hearsay. It cannot logically be maintained that the statements are not being admitted for their truth." (*Ibid*.) Defendant relies on a portion of the *Sanchez* opinion explaining that "hearsay and confrontation problems cannot be avoided by giving a limiting instruction that such testimony should not be considered for its truth. If an expert testifies to case-specific out-of-court statements to explain the bases for his opinion, those statements are necessarily considered by the jury for their truth, thus rendering them hearsay." (*Id*. at p. 684.) The problem with the *Sanchez* analogy is that Danielle had personal knowledge regarding the value of the car and was not relaying case-specific out-of-court statements to the jury as true. Here, the instruction could be applied by the jury. Moreover, defendant's argument assumes the only basis the jury could have had for finding the value of the car was greater than $950 was information from Kelley Blue Book, and thus it had to come in for its truth. Again, we disagree.

As the prosecutor demonstrated, the jury had other evidence to consider in assessing the car's value. The prosecution emphasized Danielle purchased the car for $2,000. Defendant's suggestion that we disregard this evidence because Danielle determined a fair value to pay her grandmother by looking at Kelley Blue Book is not persuasive. Danielle did not pay her grandmother $4,000 (or whatever price Kelley Blue Book indicated). She paid $2,000, and testified that her grandmother was "not going to charge [her] full price for a car." Based on this evidence, the fact that her grandmother accepted $2,000 for the car indicates it was worth more than $2,000 notwithstanding whatever Kelley Blue Book indicated the value of the car was. As the prosecution noted, the jurors could also rely on their common knowledge. (See *People v. Ortiz* (2012) 208 Cal.App.4th 1354, 1366 ["[T]he jurors could rely on their common knowledge that late-model BMW's have a substantial market value"].) There was sufficient evidence the car defendant unlawfully took was worth more than $950.

c. Confrontation Clause

Defendant argues Danielle's testimony allegedly relating contents from the Kelley Blue Book violated his rights under the federal confrontation clause. In *Crawford v. Washington, supra,* 541 U.S. 36, "the United States Supreme Court held, with exceptions not relevant here, that the admission of testimonial hearsay against a criminal defendant violates the Sixth Amendment right to confront and cross-examine witnesses." (*Sanchez, supra,* 63 Cal.4th at p. 670.) Because there was no admission of hearsay, there was no confrontation clause violation. Further, to the extent Danielle relayed any information from Kelley Blue Book, what she relayed was not testimonial in nature. (See *id.* at p. 689 ["Testimonial statements are those made primarily to memorialize facts relating to past criminal activity, which could be used like trial testimony"].) Danielle's testimony did not violate defendant's rights under the confrontation clause.

B. Prior Prison Term Enhancement

Defendant contends we must strike his prior prison term enhancement because the trial court improperly took judicial notice of an essential element of the allegation. We disagree.

Imposition of a sentence enhancement under section 667.5, subdivision (b) "requires proof that the defendant: (1) was previously convicted of a felony; (2) was imprisoned as a result of that conviction; (3) completed that term of imprisonment; and (4) did not remain free for five years of both prison custody and the commission of a new offense resulting in a felony conviction." (*People v. Tenner* (1993) 6 Cal.4th 559, 563; accord *People v. Buycks* (2018) 5 Cal.5th 857, 889.)

During the jury trial on this enhancement, the prosecution introduced a certified court conviction packet as evidence that, in 2016, defendant was convicted of felony evasion of a peace officer under Vehicle Code section 2800.2 and a felony violation of Vehicle Code section 10851, subdivision (a), and served a prison term.

The prosecution asked the court to take judicial notice of its file for case No. 17FE008868 and defendant's felony conviction on June 29, 2017. Defense counsel did not object despite being asked if she wanted to be heard on this issue. The court took judicial notice of the file and stated, "And I will indicate that upon review of this court file, it is correct or it is a fact that [defendant] was convicted of a felony on June 29, 2017 in the Superior Court of the County of Sacramento." During deliberations, the jury asked if it could view the documents pertaining to defendant's 2017 conviction. After consulting with counsel, the court responded that the jury had already received all of the evidence, and no additional evidence would be provided. The jury then found true that defendant had been convicted of violating Vehicle Code sections 2800.2 and 10851, subdivision (a) in 2016, served a prison term, and was convicted of a new felony that he committed within five years after he was no longer in custody.

We first address defendant's subsidiary assertion that while the court's file was judicially noticeable, his 2017 conviction was not. A defendant forfeits an objection that a matter is not properly subject to judicial notice by failing to object in the trial court. (*People v. Rubio* (1977) 71 Cal.App.3d 757, 767 (*Rubio*), disapproved on another ground in *People v. Freeman* (1978) 22 Cal.3d 434, 439.) Nonetheless, defendant argues his claim has not been forfeited on appeal because the alleged error was compounded by the instructions given to the jury, for which no objection was required. (*Ibid.*) We therefore analyze the propriety of judicial notice in this context.

The court may take judicial notice of the records of any court of this state. (Evid. Code, § 452, subd. (d).) " 'This includes any orders, findings of facts and conclusions of law, and judgments within court records. [Citations.] However, while courts are free to take judicial notice of the *existence* of each document in a court file, *including the truth of results reached*, they may not take judicial notice of the truth of hearsay statements in decisions and court files.' " (*In re Vicks* (2013) 56 Cal.4th 274, 314, second italics added.) This was the problem in *Rubio*, on which defendant relies. The trial court

improperly took judicial notice of an inadmissible hearsay statement in the court's minute orders that defendant had failed to appear for his first trial date "without sufficient excuse." (*Rubio, supra,* 71 Cal.App.3d at pp. 765-766.) Here, the trial court took notice of the fact of a previous felony conviction. Taking judicial notice of a prior felony conviction is permissible in the abstract. With that understood, we will now address defendant's argument that the court erred because it took judicial notice of an essential element of the prior prison term allegation, foreclosing the jury from finding he did not remain free of a subsequent felony conviction for five years, and thereby violating his right to due process and a jury trial.

A defendant has a constitutional right to have the jury determine every element of the charged offense. (*People v. Kobrin* (1995) 11 Cal.4th 416, 423.) An instruction telling the jury that an element of the offense has been established violates the defendant's right to due process and trial by jury. (*Id.* at p. 423, & fn. 4; *People v. Figueroa* (1986) 41 Cal.3d 714, 725-726.) "[N]o matter how conclusive the evidence, a trial court cannot directly inform the jury that an element of the crime charged has been established. Absent a stipulation by the defendant that an element is established or is admitted, the trial court must submit that question to the jury." (*People v. Moore* (1997) 59 Cal.App.4th 168, 181.)

Defendant relies on *People v. Barre* (1992) 11 Cal.App.4th 961, 963 (*Barre*) in which the defendant was charged with petty theft with a prior felony conviction for petty theft (§ 666). He pled not guilty and denied the alleged prior. (*Barre, supra,* at p. 963.) The prior conviction allegation was submitted to the jury. (*Id.* at p. 965, citing §§ 1025, 1158.)[5] *Barre* held that the trial court erred by instructing the jury that it took judicial notice of defendant's prior conviction because the instruction could be only be

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[5] The right to have a jury determine the truth of such prior conviction allegations is "purely statutory in origin." (*People v. Mosby* (2004) 33 Cal.4th 353, 360.)

understood to mean "the *trial court* had conclusively determined the prior-conviction allegation to be true and it was no longer a fact to be determined by the jury." (*Id.* at p. 966.) The appellate court held this deprived the defendant of his right to a jury trial. (*Ibid.*)

Here, it appears defendant essentially stipulated to the existence of a felony conviction on June 29, 2017. In addition to failing to object to judicial notice of this information, defendant waived jury trial on his section 666.5 enhancement allegation and appears to have admitted to the same felony conviction in that context. We also note that, though it was not instructed as such, the jury had just convicted defendant of a felony that served the same purpose as the 2017 felony conviction under section 667.5—it precluded the application of the five-year washout provision. Thus, defendant's basis for contesting the one-year enhancement for having a prison prior was his assertion there was insufficient proof of the prison prior, rather than that the washout exception applied. Further, agreeing to the 2017 felony conviction appeared to have a legitimate tactical purpose. It avoided informing the jury what the 2017 conviction was for, or allowing them to see potentially unflattering material in the file, when the conclusion that defendant had a recent felony conviction was unavoidable. Under these circumstances, we conclude defendant stipulated to the existence of a 2017 felony conviction and cannot complain on appeal that he has been deprived of his due process rights or right to jury trial right on whether it occurred. (*People v. Moore*, *supra*, 59 Cal.App.4th at p. 181.)

III. DISPOSITION

The judgment is affirmed.

/S/

RENNER, J.

We concur:

/S/

HULL, Acting P. J.

/S/

MURRAY, J.